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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 954

STEPHEN A. CINO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR REHEARING OF DENIAL OF CERTIORARI

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STEPHEN A. CINO,

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PETITION FOR RE-HEARING OF DENIAL OF CERTIORARI

Petitioner Stephen A. Cino respectfully prays for re-hearing of the order of March 24, 1969 denying his petition for certiorari. By order of Mr. Justice Harlan the time for filing this petition for re-hearing has been extended to May 12, 1969.

This petition for re-hearing is addressed solely to the issues presented by the two items of electronic monitoring involved in the companion group of cases (nos. 474, 715, 720, 954 (this case), and 1112 Misc.) of which this case is one. The respective petitions for certiorari in all of the cases of said companion group were disposed of on

March 24, 1969. All of those petitions for certiorari were denied except no. 474 (*Natarelli* v. *United States*) and no. 715 (*Randaccio* v. *United States*). The granting of certiorari in nos. 474 and 715 was evidently addressed to a trespassory room-bug electronic over-hearing of petitioners Natarelli and Randaccio (see the *per curiam* opinion-order of March 24, 1969 in no. 28, *Giordano* v. *United States,* first footnote). The granting of certiorari in nos. 474 and 715 evidently contemplates remand proceedings in conformity with *Alderman* v. *United States* (no. 133, Oct. Term 1967), decided March 12, 1969.

In no. 1112 Misc. (*Sorgi* v. *United States*) of the within companion group of cases, where certiorari was denied, the petitioner argued that his rights were violated by another electronic over-hearing, a listening on an extension telephone to petitioner Sorgi's telephone conversation with one Michael Fitzgerald.

The petitioner herein, Cino, in his petition for certiorari (no. 954), raised the issue as to both of the above mentioned electronic over-hearings (no. 954, Pet. Cert., Question Presented no. 7, at p. 4; and *id.,* "Reason" no. V, at p. 21).

First, although our Question Presented no. 7 raised both of the aforesaid electronic issues, our discussion of the subject under our "Reasons" at p. 21 of our petition for certiorari, which was a very short discussion mainly consisting of an adoption of those same contentions as presented in the companion petitions, did not *expressly* adopt the respective discussions of the companion petitioners in no. 474 (Natarelli) and in no. 715 (Randaccio) with respect to the electronic over-hearing of Natarelli and Randaccio. We now respectfully pray that, if such omission in our petition for certiorari was a factor in the Court's decision to deny us certiorari, our petition for

certiorari should be construed as having included, on a fair reading of our Question no. 7 and our "Reason" no. V, a due adoption of the pertinent respective treatments in the petitions for certiorari in no. 474 (Natarelli) and no. 715 (Randaccio).

Second, as to the electronic over-hearing of Natarelli and Randaccio, we take it that the granting of certiorari to those two petitioners, interpreted in conjunction with the denial of certiorari to Cino, and read also in the light of the Court's reference to *Alderman* in granting certiorari to Natarelli and Randaccio, means that Cino was denied certiorari because the Court deemed him to be without "standing" under the *Alderman* tests—i.e., the Natarelli-Randaccio over-hearing involved neither premises of Cino nor Cino's own conversations nor his presence. We now respectfully urge as follows: The Natarelli-Randaccio electronic "bugging", done in an apartment of a friend of Randaccio, occurred on February 5, 1965, a time within the instant indictment period. The indictment was filed in March 1967. The trial commenced in October 1967. On January 31, 1966 the Court granted certiorari in *Osborn* v. *United States,* 382 U. S. 1023. On December 12, 1966 the Court decided *Osborn* v. *United States,* 385 U. S. 323. On March 13, 1967 the Court granted certiorari in *Katz* v. *United States,* 386 U. S. 954. On March 20, 1967 the Court decided *O'Brien* v. *United States,* 386 U. S. 345. On May 22, 1967 the Court decided *Hoffa* v. *United States,* 387 U. S. 231. On June 12, 1967 the Court decided *Berger* v. *New York,* 388 U. S. 41. On December 4, 1967 the Court requested the Solicitor General to file a response to the petition for re-hearing in *Kolod* v. *United States,* 389 U. S. 966. On December 18, 1967 the Court decided *Katz* v. *United States,* 389 U. S. 347. On January 29, 1968 the Court granted the petition for re-hearing and the petition for certiorari and re-

manded the case, in *Kolod* v. *United States,* 390 U. S. 136. On March 4, 1968 the Court granted certiorari in *Desist* v. *United States,* 390 U. S. 943. On June 17, 1968 the Court restored to the calendar for re-argument the motion of the United States to modify the order of January 29, 1968 in *Alderman* v. *United States,* 392 U. S. 919 (formerly *sub nom. Kolod* v. *United States*). On April 22, 1968 the Court granted certiorari in *Kaiser* v. *New York,* 390 U. S. 1023. *Passim* in the course of the docketings of certain "Alderman"-issue petitions for certiorari which became docketed for the 1968 Term, the Court deferred disposition of these petitions (including the respective companion petitions herein) cited in the first footnote in the *per curiam* order-opinion in *Giordano* v. *United States,* no. 28, Oct. Term 1968 (decided March 24, 1969), evidently pending final decision on the re-argument in *Alderman, supra.* On March 12, 1969 the Court decided *Alderman* v. *United States,* no. 133 (Oct. Term 1967). On March 24, 1969 the Court decided *Desist* v. *United States,* no. 12, and *Kaiser* v. *United States,* no. 62, and on the basis of *Alderman, supra,* it disposed of the companion petitions for certiorari herein together with the several other "Alderman"-issue petitions for certiorari listed in the aforementioned first footnote in *Giordano* (*supra*). On April 7, 1969 the Court granted certiorari in *United States* v. *White,* no. 124. The significance of the foregoing chronology, for our situation, is as follows: The events in the above chronology commencing with the granting of certiorari on January 31, 1966 in *Osborn, supra,* taken together with the *Black-Schipani** electronic review procedures which developed during the second-

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* *Black* v. *United States,* 385 U. S. 26, decided November 7, 1966; *Schipani* v. *United States,* 385 U. S. 372, decided December 12, 1966.

half of the year 1966, and the aftermath of the latter review procedures (in cases like *O'Brien, Hoffa* and *Desist, supra*), have a two-fold bearing on the merits of this petition for re-hearing in regard to the Natarelli-Randaccio trespassory room-bug over-hearing as well as the Sorgi telephone over-hearing. These two-fold aspects are that of "standing", and that of "retroactivity". As to "standing" the Black-Schipani developments eventuated in decisions such as *O'Brien* (386 U. S. 345) and *Hoffa* (387 U. S. 231), *supra,* where "standing" was accorded to all defendants, not only to defendants whose conversation was over-heard or whose premises were involved or whose presence at the scene of the over-hearing was involved. Indeed, in the Brief For The United opposing certiorari in *O'Brien,* dated February 1967, p. 12, n. 5 (no. 823, Oct. Term 1966), the Solicitor General said "Although no conversation of petitioner Parisi was overheard we do not oppose the same disposition of his case as is afforded to petitioner O'Brien"; and in *Hoffa, supra,* decided May 22, 1967, the Court expressly accorded standing, for the purposes of electronic-hearing remand, "to each of the petitioners", with the pointed comment (rejecting the Solicitor General's suggestion that further electronic inquiry should be confined to the conviction of the single petitioner, Burris, whose conversations had been over-heard) that "We consider it more appropriate that each of these petitioners be provided an opportunity to establish, if he can, that the interception of this particular conversation, or of other conversations, vitiated in some manner his conviction" (387 U. S. at 233). The *Kolod-Alderman* case, which likewise has apparently involved all along this same issue of "standing", was reactivated by the Court *via* its request on December 4, 1967 to the Solicitor General to file a response to the petition for rehearing in that case (*supra*—389 U. S. 966). Simi-

larly, the order of January 29, 1968, granting electronic-hearing remand relief in *Kolod* (*supra*—390 U. S. 136), and the grant of certiorari in *Desist* on March 4, 1968 (*supra*—390 U. S. 943) where the "standing" issue was necessarily involved as to two of the five petitioners,* signified the full continuing vitality of the *O'Brien-Hoffa* principle of the "standing" of all co-defendants. It was not until the decision of March 12, 1969 in *Alderman* that the Court gave any intimation that the undifferentiated right of "standing" as among co-defendants, the right which had been expressly applied as early as *O'Brien* (*supra*—March 20, 1967, 386 U. S. 345), was modified or abridged. We respectfully submit that the Court's pronouncements on "standing" commencing in *O'Brien* (March 20, 1967), so positively reiterated in *Hoffa* (May 22, 1967), and evidently followed in *Kolod-Alderman* and *Desist* down until at least March 12, 1969 (when *Alderman* was decided),** were the law until at least the latter date. If we are correct in this latter suggestion, does it not follow, in view of the Court's whole recent approach on the problem of "retroactivity" as such in *Desist* and *Kaiser*,

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* In the Brief In Opposition in Desist, p. 9 (no. 909, Oct. Term 1967), the Solicitor General, although referring to the status of the two petitioners above mentioned, conceded that, without differentiation among the petitioners, "If the principle announced in *Katz* is to be applied to cases pending on appeal on the date of that decision, the affirmance of petitioners' convictions cannot stand". And in the Government's brief on the merits and in its oral argument in Desist (no. 12, Oct. Term 1968) no issue was argued as to "standing".

** Incidentally the decision on the merits in *Desist* (no. 12, March 24, 1969) made no mention of the "Alderman" issue of "standing"—perhaps the "standing" issue did not have to be reached in view of the disposition of *Desist* on the basis of the non-retroactivity ruling in that case.

supra (both decided March 24, 1969), which the Court intimated in *Desist* was foreshadowed in *Fuller* v. *Alaska,* 393 U. S. 80,* that for fairness (not to say for consistency on the Court's own part), the anti-"standing" ruling of *Alderman* (March 12, 1969) should be given only prospective effect and that the prior pro-"standing" rule (of, e.g., *O'Brien* and *Hoffa*) should be controlling in all cases (including our case) which were pending on trial or on direct appeal before the March 12, 1969 decision in *Alderman?* The possible analytical anomalies posed by this latter suggestion of ours should not in themselves deter or defeat our suggestion. Rather, Mr. Justice Harlan's remark, in his dissenting opinion in *Desist* (no. 12, March 24, 1969), that "'Retroactivity' must be rethought", should be given every earnest consideration before this suggestion of ours is rejected. As regards *Desist's* adoption of the absolute "prospectivity" cut-off principle of *Stovall* v. *Denno,* 389 U. S. 293 (that the newly announced principle of the decision applies only to police action occurring after the date of such decision), i.e., as regards the problem of whether the pre-*Alderman* "standing" rule of *O'Brien, Hoffa,* etc. can benefit the within petitioner Cino, the relevant chronological considerations are entirely favorable to Cino's position. While the Natarelli-Randaccio trespassory bugging in our case occurred in February 1965—and the Sorgi telephone overhearing occurred in July 1965—and while the first recent-phase indicated disposition on the part of this Court to re-examine the whole federal electronic-eavesdropping jurisprudence may be said to have been signaled by the

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* And which the Court's overall discussion in *Desist* and *Kaiser* furthermore orients into a like non-retroactivity foreshadowing for this electronic area ever since *Linkletter* v. *Walker,* 381 U. S. 618.

granting of certiorari on January 31, 1966 in *Osborn* (382 U. S. 1023), and while *Osborn* was not decided until December 12, 1966 (385 U. S. 323), and while the initiating developments of the *Black-Schipani* review procedure did not take place until November-December 1966, all of which post-dated the police action in our case (February and July 1965), nevertheless the trial in our case commenced in October 1967, and the only electronic eavesdropping guideline for retrocativity *versus* prospectivity prior to the commencement of our trial was the analogous guideline of the Fourth Amendment ruling in *Linkletter* v. *Walker, supra* (decided June 7, 1965) which made the newly announced principle applicable to all cases then subject to direct review. That is, while the "all out" prospectivity rule of *Stovall* was announced on June 12, 1967, which was before our trial commenced (October 1967), it was not until *Desist* (March 24, 1969) that the *Stovall* rule was applied to the electronic situation. And, in keeping with our above suggestion that the Court's current "prospectivity" preference should at least itself be administered in doctrinal consistency with "prospectivity", we respectfully urge that, not only should the *Alderman* rule on "standing" be given only "prospective" effect, but that also the *Desist* rule on "prospectivity", i.e., *Desist's* adoption of *Stovall,* should itself be given only "prospectivve" effect. If we prevail in this latter argument, it would follow that (1) petitioner Cino should be given the benefit of the pre-*Alderman* rule on "standing", and (2) that such pre-*Alderman* rule on "standing" should in turn be applied to petitioner Cino in the framework of the pre-*Stovall* rule of retroactivity-prospectivity—which would mean that Cino should be given standing to litigate both of the electronic over-hearings in this case on the basis that his trial commenced (October 1967) at a time when the overall retroactivity-prospectivity doctrines of this

Court entitled a party who was complaining of electronic over-hearing to be heard on that issue in this Court if his trial commenced prior to the decision in *Desist* (March 24, 1969). Once more, we urge, not without diffidence (in view of the analytical intricacy of the problem, but it is an intricacy that seems to us unavoidable in view of this Court's own series of decisions), that the admittedly forbidding analytical task which we are here asking the Court to undertake, may claim the commendation of Mr. Justice Harlan's words in *Desist* that "'Retroactivity' must be rethought".

Second, our discussion in the last preceding paragraph was addressed primarily to the problem of petitioner Cino's standing to challenge the trespassory bugging of Natarelli-Randaccio and the telephone over-hearing of Sorgi. We have not yet touched upon the Sorgi-telephone problem as such, i.e., the problem which we realize we face regarding that Sorgi telephone over-hearing in view of the Court's having denied certiorari to Sorgi himself. Nor have we dealt systematically, as yet, in this petition for re-hearing, with the problem of retroactivity in relation to the *Desist* ruling which held *Katz* to be purely prospective (à la Stovall); our remarks in the last preceding paragraph concerning retroactivity were primarily addressed to retroactivity in relation to "standing". There remain to be considered the more inclusive aspects of the retroactivity problem in and of itself in light of *Desist-Katz.* In this paragraph we wish to speak further of the latter problem; in our next paragraph we shall speak more specifically of the Sorgi-telephone problem as such, the problem of the Court's having denied certiorari to Sorgi himself. The larger retroactivity problem of *Desist-Katz* is, in the first place, not applicable here as regards the Natarelli-Randaccio bugging, because that was a trespassory bugging of the sort deemed unlawful pre-*Katz.*

However, that *Desist-Katz* retroactivity problem does have to be faced here in regard to the Sorgi-telephone over-hearing, because it is arguable (against us) that the Sorgi-telephone over-hearing was lawful pre-*Katz* in view of *Rathbun* v. *United States,* 355 U. S. 107, since the Sorgi-telephone over-hearing was done with the consent of Fitzgerald. Our answer to this *Rathbun* aspect rests above all on the impact of *Osborn, supra* (385 U. S. 323) —plus the granting of certiorari in *United States* v. *White* (no. 124, Oct. Term 1968, cert. granted April 7, 1969), plus the impact of *Katz.* Our thought in this regard is that *Osborn initiated, Katz* confirmed, and the granting of certiorari in *White* has further confirmed, the constitutional idea that the "uninvited ear", the electronic "uninvited ear", has been subject since *Osborn* to the Fourth Amendment requirement of an advance judicial warrant complying with the requirements of probable cause, no matter by what method such electronic "uninvited ear" tries to intrude itself into private conversations. This idea must include, it would seem, any device or method for putting the "uninvited ear" into a private telephone conversation, and if this is correct it should make no difference that one party to such private telephone conversation "invited" an outside police ear, for such unilaterally invited outside police ear would still be "uninvited" by the non-inviting and non-consenting party to the private telephone conversation.* Now, it appears that the

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* In *Lee* v. *Florida,* 392 U. S. 378, the Court expressly declined to reach (on the record there) the Fourth Amendment issue under *Katz* with respect to telephone privacy. And in *Kaiser* v. *New York,* no. 62, Oct. Term 1968, decided March 24, 1969, the Court also did not reach the merits of that Fourth Amendment issue concerning telephone privacy, at least the Court did not reach that issue in *Kaiser* in a manner that would be dispositive of our present Fourth Amendment contention concerning telephone privacy *vis a vis* privacy-invasion by federal police even with "Rathbun"-type consent of one party to the conversation.

granting of certiorari in *White, supra,* which is to be considered on the merits at the next Term, must inevitably entail litigating the *contemporaneous* meaning of what the Court did in *Osborn.* That is, *White* involves the question of one-party-consensual "uninvited ear" electronic over-hearing. True, *White,* on its facts, presents that problem in relation to the "minifon" type of over-hearing (i.e., minifon plus transmitter), rather than telephone over-hearing with consent of one party. But in *Katz's* terms of the electronic "uninvited ear", the *White* and the *Rathbun* situations seem indistinguishable. Does it not follow, then, that if (as we are venturing to prognosticate) this Court's forthcoming full consideration of *White* must entail a likewise full exegesis of the *contemporaneous* meaning of *Osborn,* and of *Katz's* doctrinal relation to *Osborn,* the Court in *White* will inevitably be copying in turn with the "retroactive" doctrinal relation between *Rathbun* and *Osborn-Katz?* We especially emphasize *Osborn* in this connection, because *Osborn's contemporaneous* place in the chronology of our case, as previously noted, could well result (depending on how this Court decides *White*), in a ruling that from the doctrinal standpoint *Osborn* contemporaneously undermined (or necessarily overruled) *Rathbun*—in which event the Sorgi-telephone over-hearing in our case would be eligible for re-examination. And in such latter event, petitioner Cino might well become entitled—in view of our above discussion of the "standing" problem—to request re-examination with respect to the Sorgi-telephone over-hearing. If the Court sees merit in our foregoing argument in this paragraph, what the Court may find it appropriate to do is, that the Court may decide either to grant this petition for re-hearing subject to final disposition of the *White* certiorari, or that the Court may wish to "hold" this petition for re-hearing pending argument and decision of the

White case, and that in any event the Court may decide to permit us to file a participating brief in the *White* case. In other words, if, *per White,* the *Osborn* ruling or *Osborn* as glossed by *Katz* should be declared by this Court to have *contemporaneously* put one-party-consensual electronic over-hearing under the Fourth Amendment, we would then be in a position to urge that *Osborn* necessarily undermined or overruled *Rathbun,* in which event the retroactivity-prospectivvity problem of *Katz-Desist* would not be an impediment to the granting of certiorari to petitioner Cino in regard to the Sorgi-telephone over-hearing. For, instead, all of the relevant chronological incidences previously described would entitle Cino to claim that, both in point of standing and in point of retroactivity-prospectivity doctrine, he is entitled to the contemporaneous benefit of *Osborn* as the proper constitutional vehicle for relieving him of the supposed *Rathbun* impediment.

Third, we had above reserved for separate discussion, in the interest of analytical clarity, the problem of whether the denial of certiorari herein to Sorgi (which was done presumably on the strength of *Rathbun*) forecloses Cino from pleading the Sorgi-telephone item as a ground for certiorari—that is, whether aside from the question of Cino's standing on the Sorgi-telephone item, and aside from the larger aspect of the *Katz-Desist* retroactivity problem, Sorgi's own rights were violated by the telephone over-hearing. As the Court will have perceived from our last preceding paragraph, this question of Sorgi's own rights, a question which involves the expected forthcoming elucidation which *White* may contribute to an understanding of the *contemporaneous* constitutional impact of *Osborn,* depends on what the Court is going to decide or say in *White* about *Osborn's* impact on *Rathbun*—and/or about the combined impact of *Osborn* and

Katz on *Rathbun.* If, in *White,* the Court should decide that *Osborn* effectively destroyed the consensual rationale of cases like *Rathbun,* it would then follow that a petitioner in the position of Sorgi would have a Fourth Amendment aggrievement (invasion of telephone privacy, even though by consent of one party). And the question would then arise, (1) would Sorgi's thus newly announced Fourth Amendment right be "retroactively" available to him, and (2) would Cino's derivative right be available to him both in point of "standing" and in point of "retroactivity" for general Fourth Amendment purposes and for "standing" purposes. In short, the problem of *Rathbun versus Osborn* or of *Rathburn versus Osborn* and *Katz, viz.,* the problem of whether any and all "uninvited ear" electronic over-hearing which occurred in this case was subject to Fourth Amendment requirements, may well turn out to be a problem whose answer will be known only after this Court at the next term decides the *White* case—as we more fully set forth in another connection in our last preceding paragraph.

CONCLUSION

It is respectfully prayed that this petition for re-hearing should be granted.

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Certificate of Counsel

I certify that the foregoing petition for re-hearing is presented in good faith and not for delay (petitioner Cino is incarcerated serving his sentence and no application for bail is pending or contemplated in the present posture of the case), and that the petition is restricted, to the best belief and assurance of counsel, to the grounds specified in Rule 58(2).

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